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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000215-001 DT 10/09/2014

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA ANDREA A GUTIERREZ

v.

AMANDA KATHLEEN TURNER (001) CAMERON A MORGAN

PHX CITY MUNICIPAL COURT
PHX MUNICIPAL PRESIDING JUDGE
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case Number 14009900–01, –02, –03.

Defendant-Appellee Amanda Turner (Defendant) was charged in Phoenix Municipal Court with driving under the influence and driving under the extreme influence. The State contends the trial court erred in granting her Motion To Suppress, which alleged her consent to the blood test was not voluntary. For the following reasons, this Court vacates and reverses the ruling of the trial court.

I. FACTUAL BACKGROUND.

On August 23, 2012, the State charged Defendant with driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and driving under the extreme influence, A.R.S. § 28–1382(A)(1) (0.15 or more). On July 3, 2013, Defendant filed a Motion To Suppress contending: (1) The police obtained Defendant's blood sample in violation of the Fourth Amendment; (2) Defendant did not expressly consent to the blood draw; and (3) the consent Defendant gave was involuntary. On September 6, Defendant filed a Supplemental Motion on Implied Consent contending Arizona's Implied Consent Law, A.R.S. § 28–1321(A), is unconstitutional. On July 10 and September 30, the State filed responses.

At the hearing on Defendant's Motion To Suppress, the attorneys stipulated that the officers had reasonable suspicion to stop Defendant's vehicle and had probable cause to arrest her for driving under the influence. (R.T. of Dec. 17, 2013, at 6–7.) Officer Steven Reeves testified he stopped Defendant on the night in question, ultimately placed her under arrest, and transported her to the DUI van. (*Id.* at 40–42.) Once they arrived at the DUI van, Defendant said she would not do any further tests without talking to an attorney, so Officer Reeves allowed her to remain in the patrol vehicle while she talked on a phone to an attorney. (*Id.* at 42–43.) He knew she was talking to an attorney because she told him so. (*Id.* at 43.) He then took her into the DUI van and

observed the proceedings conducted by Officer McGillis. (*Id.* at 45.) Officer Reeves said Defendant consented to the blood test and never indicated in any way she was going to refuse to submit to the blood test. (*Id.* at 46, 50.) Other than the time she asked to talk to an attorney when they arrived at the DUI van, Defendant never again asked to talk to an attorney. (*Id.* at 46–47.)

Officer Michael McGillis testified he observed Defendant in the patrol vehicle talking on a phone. (R.T. of Dec. 17, 2013, at 11.) Once Officer Reeves brought Defendant into the DUI van, Officer McGillis obtained her biographical information, read her the *Miranda* warnings, and read her the information on the Admin Per Se/Implied Consent Affidavit. (*Id.* at 11–13.) Officer McGillis then asked her if she would submit to a blood test, and she said, "Yeah, I agree." (*Id.* at 17.) He had her sign the Consent Form, which the trial court admitted as State's Exhibit #1. (*Id.* at 18.) At no time did Defendant say she did not want to take the blood test or give any indication she would not cooperate. (*Id.* at 18–19.) On cross-examination, Officer McGillis read the admonition he had read to Defendant. (*Id.* at 28–29.) He said he marked "yes" on the form, and again said Defendant's answer was, "Yes, yeah, I agree." (*Id.* at 29.) He said there was no force involved. (*Id.* at 31.)

Defendant then testified and acknowledged Officer Reeves never asked her if she would submit to a blood test. (R.T. of Dec. 17, 2013, at 51–52.) She acknowledged Officer Reeves allowed her to talk to her attorney, and that the officers never interfered in any way with her conversation. (*Id.* at 52–53.) She acknowledged Officer McGillis asked her to take a blood test and correctly recounted the admonitions he had read to her. (*Id.* at 53.) Concerning her decision to take the blood test, Defendant testified as follows:

> Q. All right. Now did you hear the testimony, his testimony of exactly what was read to you?
>
> A. Yes.
>
> Q. All right. Do you agree that's exactly what was read to you?
>
> A. Yes, I remember.
>
> Q. There are two statements in there I want you to focus in on. One of the statements that was read to you said: "Arizona law requires you to take a blood or breath test."
>
> A. Right.
>
> Q. Now the other second statement, you agree that that was read to you, correct?
>
> A. Right.
>
> Q. The second statement was that, in the event that you refuse, your license would be suspended for a year; is that correct?
>
> A. Correct.
>
> Q. Did those two statements impact your decision to agree to a blood test in this case?
>
> A. Absolutely.

Q. How?

A. I was cooperating with the law. Also I was a real estate agent at the time and could not afford to lose my license.

Q. For?

A. A year.

Q. Okay?

A. At all.

Q. You know that you were also told that if you took the test and it was over a .08 you'd lose your license for 90 days, right?

A. Right.

Q. In your opinion, is 1 year worse than 90 days?

A. Absolutely.

(R.T. of Dec. 17, 2013, at 53–54.) On cross-examination, Defendant acknowledged she had been arrested for DUI in 2007. (*Id.* at 55.)

After hearing arguments from the attorneys, the trial court granted Defendant's Motion To Suppress as follows:

> THE COURT: . . . I think if a defendant, and Ms. Turner in this case, feels that she's being coerced, that is significant; that does impact whether she's giving expressed consent. And her testimony clearly was—and I find her credible—that she felt coerced, she felt she had no choice.
>
> And as a result the Court finds that Ms. Turner's consent was not an expressed consent. Therefore—and I'm not reaching the issue of the constitutionality, someone else will do that, I suppose, but I don't think I'm required or in fact should, given the particular facts, given the totality of the circumstances here suggest on a narrow basis that Ms. Turner's—what's the word I want to use, the assent to the test was not a clear and expressed consent.
>
> Therefore I grant the motion to suppress.

(R.T. of Dec. 17, 2013, at 82.) On December 26, 2013, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Does the record support the trial court's finding that Defendant did not give "clear and expressed consent" to the blood test.*

In its ruling, the trial court granted Defendant's Motion To Suppress because it found Defendant's "assent to the test was not a clear and expressed consent." (R.T. of Dec. 17, 2013, at 82, l. 22.) In *Carrillo v. Houser*, 224 Ariz. 463, 232 P.3d 1245 (2010), the Arizona Supreme Court held Arizona's Implied Consent Law, A.R.S. § 28–1321, "does not authorize law enforcement officers to administer the test without a warrant unless the arrestee expressly agrees to the test." *Carrillo* at ¶ 1. The court then elaborated further:

> The statute requires that an arrestee "expressly agree" to warrantless testing. "Expressly," as we have noted in another context, means "in direct or unmistakable terms" and not merely implied or left to inference. Failing to actively resist or vocally object to a test does not itself constitute express agreement. Instead, to satisfy the statutory requirement, the arrestee must unequivocally manifest assent to the testing by words or conduct.

Carrillo at ¶ 19 (citations omitted). In the present case, Officer McGillis testified that, when he asked Defendant if she would submit to a blood test, she said, "Yeah, I agree." (R.T. of Dec. 17, 2013, at 17, 29.) Defendant then signed the Consent Form, which the trial court admitted as State's Exhibit #1. (*Id.* at 18.) Defendant acknowledged she agreed to take the blood test. (*Id.* at 53–54.) The record shows Defendant's conduct satisfied the "expressly agree" requirement of *Carrillo* and thus does not support the trial court finding "that Ms. Turner's consent was not an expressed consent." (R.T. of Dec. 17, 2013, at 82, ll. 15–16.) To the extent the trial court's ruling could be construed as a finding that the officers did not comply with *Carrillo,* the record does not support that finding, thus the trial court abused its discretion in granting Defendant's Motion To Suppress on that basis.

B. *To the extent the trial court's ruling could be construed as a finding that Defendant's consent was not voluntary, does the record support that finding.*

Although the trial court granted Defendant's Motion To Suppress because it found "that Ms. Turner's consent was not an expressed consent," it appears the trial court may have meant that it found the consent that Defendant expressly gave was not voluntary. The question then is whether the record supports the trial court's possible finding that Defendant's consent was not voluntary. Although the trial court did not make a ruling on the constitutionality of Arizona's Implied Consent Law, Defendant's attorney contends this Court may uphold the trial court's ruling based on the claim that the implied consent statute is unconstitutional. This Court is of the opinion that a determination of the constitutionality of Arizona's Implied Consent Law is the starting point in determining whether Defendant's consent was voluntary.

1. *The constitutionality of Arizona's Implied Consent Law.*

In *Campbell v. Superior Court (White),* 106 Ariz. 542, 479 P.2d 685 (1971), the Arizona Supreme Court upheld the validity of Arizona's Implied Consent Law, former A.R.S. § 28–691 [now A.R.S. § 28–1321]. It first held the law was a reasonable regulation:

> In Arizona the use of the highways of this state is a right which all qualified citizens possess subject to reasonable regulation under the police power of the sovereign.
>
> . . . .
>
> Even though Arizona's Implied Consent Law seeks to achieve a legitimate legislative purpose, the question remains whether the means are reasonable. More specifically, is it reasonable under the circumstances to require a person to submit to a chemical test of his blood, breath or urine if arrested for driving while intoxicated or face a six months suspension of his driver's license. We are of the opinion that it is.
>
> . . . .

> Clearly, upon the basis of the above cited authority, the breathalyzer test is a reasonable means for achieving the goals of the legislature. We believe that it is also reasonable to suspend the driver's license of a person who refuses to submit to the tests provided for in the Implied Consent Law.

106 Ariz. at 545–46, 547, 479 P.2d at 688–89, 690. The court next held Arizona's Implied Consent Law did not violate the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to counsel. 106 Ariz. at 548–50, 479 P.2d at 691–93. And finally, the court held Arizona's Implied Consent Law did not violate the Fourth Amendment:

> Respondent's final contention is that the Implied Consent Law violates the Fourth Amendment of the United States Constitution. We find no merit in this argument in light of the holding in Schmerber v. State of California.

106 Ariz. at 554, 479 P.2d at 697 (citations omitted). Thus, the Arizona Supreme Court has held Arizona's Implied Consent Law is valid.

The Arizona Supreme Court was presented with the opportunity to modify or overrule *Campbell*, but chose not to do so:

> Other limits of our decision also merit comment. Our holding reflects the requirements of A.R.S. § 28–1321; because we resolve this case as a matter of statutory interpretation, we need not address any constitutional issues raised by Carrillo. *Cf. South Dakota v. Neville* (stating that under *Schmerber v. California*, a state may "force a person suspected of driving while intoxicated to submit to a blood alcohol test"); *Campbell* (rejecting Fourth Amendment challenge to implied consent law as meritless in light of *Schmerber*).

Carrillo at ¶ 21 (citations and footnotes omitted). As the Arizona Court of Appeals has said on numerous occasions, "We are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *State v. King*, 222 Ariz. 636, 218 P.3d 1093, ¶ 6 (Ct. App. 2009) (court of appeals felt constrained to follow *State v. Dumaine*, 162 Ariz. 392, 783 P.2d 1184 (1989)), *vac'd, State v. King,* 225 Ariz. 87, 235 P.3d 240, ¶ 12 (2010) (disapproving language in *Dumaine*); *State v. Miranda*, 198 Ariz. 426, 10 P.3d 1213, ¶¶ 8, 13 (Ct. App. 2000) (court of appeals felt constrained to follow *State v. Angle*, 149 Ariz. 478, 720 P.2d 79 (1986), rather than *State v. Cutright*, 196 Ariz. 567, 2 P.3d 657 (Ct. App. 1999), which seemingly changed the law established by the Arizona Supreme Court in *Angle*); *approved, State v. Miranda*, 200 Ariz. 67, 22 P.3d 506, ¶¶ 1, 5 (2001) (approving decision of court of appeals in *Miranda* and disapproving decision of court of appeals in *Cutright*). Similarly, this Court is bound by decisions of the Arizona Supreme Court and has no authority to overrule, modify, or disregard them. Thus, until such time as the Arizona Supreme Court modifies or vacates its decision in *Campbell*, this Court is bound by that decision holding Arizona's Implied Consent Law constitutional.

Defendant contends this Court is not bound by *Campbell* because of the recent opinion of the United States Supreme Court in *Missouri v. McNeely,* 133 S. Ct. 1552 (2013). Defendant reasons that (1) *Campbell* relied on *Schmerber v. California,* 384 U.S. 757 (1966), (2) *McNeely* undercut that part of *Schmerber* upon which *Campbell* relied, thus (3) *Campbell* is no longer good law. For three reasons, this Court does not agree with Defendant's contentions.

First, in this Court's opinion, *McNeely* did not undercut *Schmerber.* In *Schmerber,* the Court said as follows:

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence." We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly ***in a case such as this,*** where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. ***Given these special facts,*** we conclude that the attempt to secure evidence of blood-alcohol content ***in this case*** was an appropriate incident to petitioner's arrest.
>
> . . . .
>
> We thus conclude that ***the present record*** shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that ***we reach this judgment only on the facts of the present record.***

384 U.S. at 770–71 (emphasis added; citations omitted). In *McNeely,* the Court said as follows:

> In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber,* it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined ***case by case based on the totality of the circumstances.***

133 S. Ct. at 1563 (emphasis added). Because the Court determined both *Schmerber* and *McNeely* "case by case based on the totality of the circumstances," *McNeely* did not overrule or change *Schmerber,* and instead re-affirmed the reasoning used.

Second, both *Schmerber* and *McNeely* involved non-consensual searches:

> Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn ***despite his refusal . . . to consent to the test.***

Schmerber, 384 U.S. at 759 (emphasis added).

> The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for ***nonconsensual*** blood testing in all drunk-driving cases.

McNeely, 133 S. Ct. at 1556 (emphasis added). Because *McNeely* involved a non-consensual search, it cannot be said that it overruled *Campbell,* which involved a consensual search.

Third, *McNeely* based its reasoning in part on the fact that all 50 states have implied consent laws:

> As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless non-consensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. ***Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked,*** and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

133 S. Ct. at 1566 (emphasis added; citations omitted). As it more fully explained in *South Dakota v. Neville*:

> [T]he South Dakota statute permits a suspect to refuse the test, and indeed requires police officers to inform the suspect of his right to refuse. This permission is not without a price, however. South Dakota law authorizes the department of public safety, after providing the person who has refused the test an opportunity for a hearing, to revoke for one year both the person's license to drive and any nonresident operating privileges he may possess. Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections.

459 U.S. 5536, 559–60 (1983). It would be strange indeed for the Court in *McNeely*, in its discussion of the constitutionality of non-consensual searches, to base its reasoning on implied consent laws, such as Arizona's Implied Consent Law, that Defendant claims are unconstitutional.

As noted above, this Court considers itself bound by the Arizona Supreme Court's opinion in *Campbell*, which held Arizona's Implied Consent Law constitutional. Unless and until such time as the Arizona Supreme Court may choose to hold that *McNeely* effectively overruled *Campbell*, this Court will follow *Campbell* as written by the Arizona Supreme Court.

2. *The voluntariness of Defendant's consent.*

In light of this Court's conclusion that it is permissible for Arizona to enact an implied consent law that "impose[s] significant consequences when a motorist withdraws consent," the question then is whether Defendant's consent was involuntary. Arizona's Implied Consent Law required Defendant to choose between consenting to the blood test or losing her driver's license for 1 year. But as the United States Supreme Court has said:

> We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.

Neville, 459 U.S. at 564 (citations omitted). This Court acknowledges that *Neville* addressed a Fifth Amendment issue and the present discussion involves a Fourth Amendment issue, but as the Court has said, "The values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect." *Schmerber*, 384 U.S. at 767. This Court therefore concludes that, because a state may permissibly require a person arrested for driving under the influence to choose between taking a blood test or losing their driver's license for 1 year, that choice is not involuntary in the legal sense. Thus, to the extent the trial court found Defendant's choice to take the blood test was involuntary, the trial court was incorrect as a matter of law.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court erred as a matter of law in finding Defendant's choice to take the blood test was involuntary.

IT IS THEREFORE ORDERED vacating and reversing the ruling of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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